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No. 96-1482

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LEXECON, INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a district court, to which a case has been transferred solely for "consolidated pretrial proceedings" under the federal multidistrict litigation statute, 28 U.S.C. § 1407(a), may transfer the case to itself for purposes of trial, notwithstanding section 1407(a)'s explicit command that every such case "shall be remanded" at the conclusion of pretrial proceedings "to the district from which it was transferred."

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide.[1] WLF seeks to promote and protect the free

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[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in whole

(continued...)

enterprise system and the economic and civil liberties of individuals and businesses through civil justice reform. WLF has devoted substantial resources to promoting civil justice reform by filing comments on proposals to amend the Federal Rules of Civil Procedure, by publishing monographs and similar educational materials, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, No. 96-270 (June 25, 1997); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873 (1996). WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

WLF is filing this brief with the consent of petitioners and respondents. WLF has lodged consent letters with the Clerk of the Court.

STATEMENT OF THE CASE

In order to avoid repetitive argument, WLF adopts the Statement of the Case of the petitioners. Briefly, this case presents the question whether a federal district court authorized to conduct consolidated pretrial proceedings may transfer a case to itself for purposes of trial, notwithstanding 28 U.S.C. § 1407(a)'s mandate that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have previously been terminated . . . ." 28 U.S.C. § 1407(a). Citing an interest in efficient litigation, the Ninth Circuit below endorsed the increasingly widespread practice by which transferee courts

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[1](...continued)
or in part.

refuse to remand such cases to the original courts in which they were filed.

Petitioner Lexecon is a law and economics consulting firm. The respondents are two large law firms and certain individual lawyers within those firms who specialize in highly-publicized class action securities lawsuits. According to petitioners' allegations, after Lexecon's principal, petitioner Professor Daniel Fischel, testified for the defense in certain lawsuits filed by the respondents, respondents retaliated by trying to ruin Lexecon's reputation and put it out of business. Petitioners' complaint alleged that respondents falsely accused Lexecon of complicity with Charles Keating in the notorious *Lincoln Savings* savings and loan scandal, and by falsely portraying Professor Fischel as a crook and a racketeer.

Petitioners sued respondents for malicious prosecution, tortious interference with existing and prospective client relationships, abuse of process, defamation, and commercial disparagement. Petitioners filed their lawsuit in their home district, the Northern District of Illinois, alleging diversity jurisdiction. Initial pretrial matters were considered by that court. After six months of pretrial proceedings, respondents moved the Judicial Panel on Multidistrict Litigation (JPML) to transfer the case to the District of Arizona, pursuant to 28 U.S.C. § 1407, and consolidate the case with litigation involving the underlying *Lincoln Savings* dispute. However, before the JPML could rule on the motion, the presiding judge in the *Lincoln Savings* case recused himself from the *Lexecon* case because he felt his involvement in the *Lincoln Savings* case would make it improper for him to act as a judge in *Lexecon*.

Respondents nonetheless renewed their motion to transfer, and asked the JPML to sent the *Lexecon* case to any other judge in Arizona. Over petitioners' objection, the JPML granted respondents' motion, citing as grounds that there was an extensive document depository in Arizona and that there was a possibility of coordinating the action with an unfinished settlement involving one of the *Lincoln Savings* defendants. App. at 100a-102a.

Although there never were any coordinated proceedings and the reasons for granting the transfer evaporated, *see* Petitioners' Brief in Support of Petition for Writ of Certiorari at 6-7, the Arizona court proceeded to rule on various substantive motions, granting respondents' motion to dismiss the malicious prosecution and abuse of process claims. Petitioners then moved, pursuant to JPML Rule 14(d), to remand the case back to the Northern District of Illinois. The district court initially deferred decision on that motion until the parties completed discovery.

After the parties completed discovery, petitioners renewed their request to remand the case to Illinois. Respondents objected and filed their own motion to transfer the case permanently to Arizona, and filed a motion for summary judgment on all remaining issues. The Arizona court did not rule on petitioners' remand motion, but granted respondents summary judgment on all remaining issues except for one aspect of petitioners' defamation claim. App. at 64a-77a.

The Arizona court later denied petitioners' motion to remand and granted respondents' motion to transfer the case permanently to the Arizona court. App. at 61a-62a. Petitioners then petitioned the Ninth Circuit for a writ of

mandamus. A three-judge panel of the Ninth Circuit denied the petition, with Judge Kozinski dissenting. App. at 58a-59a. The trial on the defamation claim then went forward in the Arizona court, and respondents prevailed in a jury trial.

On appeal, a differently-constituted panel of the Ninth Circuit affirmed the district court in all respects. App. at 12a-15a. Judge Kozinski, the only member of the panel who had also ruled on the mandamus petition, again dissented. App. at 30a. Petitioners then timely petitioned this Court for a writ of certiorari, which this Court granted on May 13, 1997.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in holding that an Arizona district court, to which an action was transferred for "coordinated or consolidated pretrial proceedings" under 28 U.S.C. § 1407(a), was permitted to transfer the action to itself and conduct a trial. The district court's retention of the case for trial contravened the clear mandate of Section 1407(a) which requires that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . . ." 28 U.S.C. § 1407(a).

This unambiguous mandate is supported by the contemporaneous and subsequent legislative history of Section 1407. Congressional reports underscore what the statute clearly states, that the transferee court's role is only to conduct coordinated or consolidated pretrial proceedings, and at the conclusion of such proceedings to remand the case to the original court for trial. Congress contemplated that any additional role for the transferee court in conducting trial would require congressional authorization and, in fact, since

1968 Congress has considered and authorized a limited trial role for the transferee courts which is not applicable in this case. This subsequent history further demonstrates that Section 1407(a) as enacted did not authorize the transferee courts to conduct trials.

The erroneous widespread practice of transferee courts to "self-transfer" cannot be justified on the basis of JPML Rule 14(b) or long-standing practice. Although the JPML is authorized to prescribe rules for the conduct of its business, its authority is limited to rules "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f). Any construction of JPML Rule 14(b) which authorizes self-transfer for trial is inconsistent with the clear mandate of Section 1407(a) and is therefore invalid. Further, the widespread use of self-transfer is not a legal basis for upholding the validity of the practice in the face of the congressional mandate to the contrary.

For these reasons and the reasons set forth below, the Washington Legal Foundation ("WLF") respectfully urges this Court to reverse the decision below.

ARGUMENT

I. THE PLAIN LANGUAGE OF 28 U.S.C. § 1407(a) REQUIRES THAT THE TRANSFEREE COURT REMAND THE CASE TO THE COURT IN WHICH THE ACTION WAS ORIGINALLY FILED.

This case presents a straightforward but important question concerning the authority of federal district court judges presiding over pretrial proceedings under 28 U.S.C. § 1407(a) to retain cases for trial. Under Section 1407(a), the

Judicial Panel on Multidistrict Litigation (JPML) may transfer cases filed in federal district courts to another federal district court for consolidated pretrial proceedings. Since the JPML was created in 1968, it has transferred over 90,000 cases for consolidated pretrial proceedings, but less than four thousand (representing less than four percent) of those cases were remanded back for trial to the district court in which the complaint was filed. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1995 Report of the Director* 32, 80 (1995); App. at 30a (Kozinski, J., dissenting); *see also* Patricia D. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 479 (1989) ("not uncommon" for transferee judge to transfer action to her own district or a district other than that in which it was filed).

As these statistics indicate, it has become commonplace for district courts hearing pretrial proceedings under Section 1407(a) to retain cases for trial. However, despite the prevalence of this practice, Section 1407(a) does not authorize district courts to retain such cases for trial. To the contrary, the clear and unmistakable mandate of the statute which authorizes the JPML to transfer cases requires that "[e]ach action so transferred *shall be remanded* by the [JPML] at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . ." 28 U.S.C. § 1407(a) (emphasis added).

The cardinal principle of statutory construction is that the language chosen by Congress be given its plain meaning. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *TVA v. Hill*, 437 U.S. 153 (1978). If the statutory language is clear, "that is the end of the matter; for the court . . . must give

effect to the unambiguously expressed intent of Congress ...." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *see also West Va. Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991); *Mallard v. U.S. District Court for the Southern District of Iowa*, 490 U.S. 296, 300-02 (1988); *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 547-48 (1987) (unanimously rejecting Ninth Circuit's ruling that the term "in Alaska" should be interpreted in a general, "nontechnical" sense to mean the geographic region of Alaska).

The language "shall be remanded" is decidedly mandatory, leaving the court no room for discretion. Thus, the plain language of the statute makes clear that a case transferred for pretrial proceedings must be remanded back to the original district court for trial.

II. THE CONTEMPORANEOUS AND SUBSEQUENT LEGISLATIVE HISTORY OF SECTION 1407(a) DEMONSTRATES THAT CONGRESS INTENDED THE TRANSFEREE COURT TO REMAND THE ACTION BEFORE TRIAL.

The mandatory language of the statute is consistent with the statutory purpose of Section 1407, as evidenced by the legislative history. The report of the House Judiciary Committee, concerning the bill which became Section 1407, states:

> [T]he bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings. The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any

> case or exclude the possibility of transfer under other Federal statutes.
>
> * * *
>
> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee was limited to pretrial matters, and the committee consequently considers it desirable to keep the legislative proposal within the confines of that experience. Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district. * * *
>
> If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary.

H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900, 1901-02.

Notably, since the 1968 enactment of Section 1407, Congress has extended consolidation for trial purposes to a limited class of cases, further underscoring that the 1968 legislation did not already permit a court to retain a case for trial under Section 1407. In 1976, Congress added subsection

(h) to Section 1407 to allow the multidistrict panel to order that *parens patriae* cases brought by state attorneys general under Section 4C of the Clayton Act be transferred for both pretrial purposes and for trial. Act of Sept. 30, 1976, Pub.L. 94-435, Title III, § 303, 90 Stat. 1396. This legislation would have been unnecessary had Section 1407 as originally enacted permitted the court to retain a transferred case for trial.

Further, in 1988, the House of Representatives passed a bill to amend Section 1407 to provide that in certain mass-disaster litigation involving multiple parties and multiple forums, "the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability." H.R. 4807, § 303, 100th Cong., 2d Sess. (1988). Although the House passed the legislation, this particular provision of the legislation was eventually dropped and was not enacted into law. *See* Act of Nov. 19, 1988, Pub.L. 100-702, 102 Stat. 4642. Again, this legislation would have been unnecessary had Section 1407 already authorized the transferee court to retain an action for trial.

Thus, the contemporaneous and subsequent legislative history makes clear that the Congress meant what the statute said, that transferee courts must remand the case back to the original court for trial.

III. THE PRACTICE OF "SELF-TRANSFER" CANNOT BE JUSTIFIED ON THE BASIS OF JPML RULE 14(b) OR THE IMPROPER PRACTICE OF DISTRICT COURTS.

Contrary to the Ninth Circuit's opinion, this "self-transfer" procedure cannot be justified on the basis of JPML

Rule 14(b).[2] App. at 14a. Although Section 1407(f) authorizes the JPML to prescribe rules for the conduct of its business, those rules must be "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f). Section 1407(f) therefore does not permit the JPML to subvert the plain mandate of subsection (a) by issuing a rule authorizing self-transfer when the statute requires the remand of a case for trial.[3] *Cf. Frazier v. Heebe*, 482 U.S. 641, 645-46 (1987) (district court rule pertaining to admission of nonresident attorneys held inconsistent with Supreme Court rules of practice and procedure); *McKee v. Bi-State Dev. Agency*, 801 F.2d 1014 (8th Cir. 1986) (district court rule concerning finality of entry of judgment held inconsistent with federal statute).

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[2] JPML Rule 14(b) provides, in pertinent part: "[e]ach transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406."

[3] Moreover, 28 U.S.C. § 1404(a) likewise provides no authority for self-transfer. That provision for transfer of venue allows transfer as follows, "For the convenience of parties and witnesses, in the interest of justice, a *district court* may transfer any civil action *to any other district or division* where it might have been brought" (emphasis added). 28 U.S.C. § 1404(a). Nothing in this statute authorizes a district court to transfer an action to itself, and such a reading would be nonsensical given that 28 U.S.C. § 1404 was enacted decades before 28 U.S.C. § 1407. *See Amicus Curiae* Brief of Charles Alan Wright Supporting Petitioner on Petition for a Writ of Certiorari, 6 (April 11, 1997) ("A 1948 statute cannot be given a meaning it could not have had when it was adopted in order to provide a result under a 1968 statute that Congress specifically considered and expressly rejected.").

Moreover, Rule 14(b) governs only the internal procedures of the JPML, not the authority of the district court. Section 1407 only empowers the JPML to "prescribe rules for the conduct of its business . . . . " 28 U.S.C. § 1407(f). As dissenting Judge Kozinski noted, such rules are, in any case, not entitled to substantial deference from this Court. App. at 49a (rules are "entitled to deference only to the extent they cover JPML's business; they cannot broaden the transferee court's authority to act under Section 1404(a)."). Unlike rules promulgated pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2072-74, the JPML rules " . . . are not voted upon by the Judicial Conference of the United States; they are not adopted by the Supreme Court; they are not put before Congress for possible modification or rejection." App. at 49a.

The JPML was no doubt convinced that its rule promoted the efficient administration of justice, but this Court should not allow this worthwhile goal to be accomplished through subverting the congressional mandate. Moreover, this practice cannot be justified on the basis of long-standing practice. As *amicus curiae* Charles Alan Wright stated, "If Congress has not given the courts authority to do something, they cannot acquire that authority by adverse possession." *Amicus Curiae* Brief of Charles Alan Wright, *supra*, at 8; *cf. Finley v. United States*, 490 U.S. 545 (1989) (federal courts lacked power to exercise pendent party jurisdiction notwithstanding widespread lower court acceptance of such jurisdiction).

Although courts following the Second Circuit's decision in *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971), have often allowed this self-transfer practice, commentators

have been overwhelmingly critical.[4] *See, e.g. Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC American Corp.*, 59 ANTITRUST L. J. 273, 302 (1990) ("[T]he use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters." (footnotes omitted)); Robert H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 809 (1985) ("[It] seems clear that the lower federal courts have done by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial."); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1030-31 (1974) (legislative history of section 1407 emphasizes it would be used only for pretrial proceedings); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U.CHI. L. REV. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause . . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); *see also* additional authorities noted at app. 35a-36a (Kozinski, J., dissenting.).

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[4] Lower courts authorizing self-transfer have cited *Pfizer* like a mantra, but that decision could hardly be considered seminal given its limited analysis. *See id.* at 124-25. Nonetheless, the lower courts have displayed a deference to *Pfizer* which is remarkable for the courts' lack of critical analysis. *See* App. at 32a-34a (Kozinski, J., dissenting); *id.* at 59a (Kozinski, J., dissenting) ("[m]ost [courts following *Pfizer*] have simply taken their place at the head of an ever-growing string cite.").

It may well be that judicial economy or other policy considerations would be served by allowing Section 1407(a) transferee courts to conduct trials. Or perhaps not. Consideration of the convenience of parties and witnesses, and traditional deference to the plaintiff's choice of forum, may suggest otherwise. *See* H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. at 1901 (" . . . trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district."). That policy decision is not obvious, nor is it one that Congress has delegated to transferee courts under Section 1407(a).

Along these lines, this case demonstrates why no court should presume that policy considerations dictate retention by the transferee court of a transferred case for trial. The petitioners alleged that respondents falsely defamed petitioners by making unfounded allegations concerning petitioners' ties to Charles Keating and the notorious *Lincoln Savings* scandal. Through the use of a Section 1407(a) transfer, and under the guise of consolidating pretrial proceedings, respondents forced petitioners to try their allegations in a distant forum where resentment toward Keating and anyone connected with him was likely to be most intense. Moreover, there was no connection between Arizona

and the parties, the witnesses, or the law applied to the case.[5] App. at 45a-47a (Kozinski, J., dissenting).

But, in any event, that policy decision is for Congress and not for the federal courts. Section 1407(a) does not permit the transferee court to exercise its discretion to retain a transferred action for trial. Our civil justice system cannot function fairly or effectively if judges ignore statutes which confine their authority, and this Court should not countenance a practice by which judges subvert the clear congressional mandate in order to enhance their judicial authority.

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[5] The Ninth Circuit accuses petitioner Lexecon of being "no stranger to the District of Arizona", app. at 18a, but then cites only Lexecon's participation in the underlying *Lincoln Savings* litigation and the transferee court's familiarity with the *Lexecon* suit. In these matters Lexecon's appearance in Arizona could hardly be considered voluntary. First, Lexecon appeared as a defendant in a lawsuit in which it claimed it was improperly named by the respondents as a means of retaliation against Lexecon, and second, it appeared as a plaintiff which had opposed the transfer of its lawsuit to Arizona. It may be accurate to say that Lexecon was not a stranger to Arizona, but under these circumstances it was no more than an accidental tourist.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

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